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In the Supreme Court of the United States.

OCTOBER TERM, 1962

No. ——

FRANCIS L. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS

v.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, for the United States and on behalf of the Honorable Francis L. Van Dusen, United States District Judge for the Eastern District of Pennsylvania, petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Third Circuit, entered on December 7, 1962, directing that a writ of mandamus issue, and to review the peremptory writ of mandamus issued by that court on December 14, 1962.[1]

[1] A separate petition for a writ of certiorari (No. 738, this Term), seeking review of the same judgment of the court of appeals, has already been filed by General Motors Corporation, Eastern Air Lines, Inc., and Lockheed Aircraft Corporation, who, like the United States, were defendants-intervenors below.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Appendix *infra*, p. 1a) is reported *sub nom. Popkin* v. *Eastern Air Lines, Inc.*, at 204 F. Supp. 426. The opinion of the court of appeals (App., *infra*, p. 26a) is reported at 309 F. 2d 953.

JURISDICTION

On December 7, 1962, the court of appeals, pursuant to its opinion of November 19, 1962 (App., *infra*, p. 26a), ordered the issuance of a writ of mandamus (App., *infra*, p. 35a). On December 14, 1962, the clerk of that court issued the peremptory writ of mandamus (App., *infra*, p. 37a), which was subsequently stayed pending review in this Court (App., *infra*, p. 40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 1404(a) of the Judicial Code authorizes the transfer of a civil action to a more convenient district "where it might have been brought." Does a district court have the power to order such a transfer of a personal injury or wrongful death suit, brought by a decedent's personal representative, to another district in a State in which the plaintiff has failed to obtain ancillary appointment as a personal representative?[2]

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[2] If this petition is granted, the government reserves the right to argue on its own behalf (as it did below) that mandamus was improperly issued here by the court of appeals

STATUTE INVOLVED

Section 1404(a) of the Judicial Code, 28 U.S.C. 1404(a), provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT

These actions arise out of the crash of a commercial airliner into Boston Harbor on October 4, 1960. As a result of the crash, 114 personal injury and wrongful death actions were commenced in the United States District Court for the District of Massachusetts (App., *infra*, p. 2a). The additional 45 actions here in controversy were commenced in the United States District Court for the Eastern District of Pennsylvania. In both courts suit was instituted, either jointly or separately, against Eastern Air Lines, Inc. (which operated the aircraft), Lockheed Aircraft Corporation (manufacturer of the aircraft), General Motors Corporation (manufacturer of the

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because plaintiffs had failed to utilize the procedure prescribed by the Interlocutory Appeals Act, 28 U.S.C. 1292(b). It would seem that that Act, rather than the extraordinary writ of mandamus, furnishes a more appropriate basis for appellate review of transfer orders, particularly where such review is sought on the ground that the transferee court is not one in which the action "might have been brought." See H. Rep. No. 1667, 85th Cong., 2d Sess., pp. 1–2; see also testimony of late Chief Judge Parker, Hearings on H.R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., pp. 8–9; *Deepwater Exploration Co.* v. *Andrew Weir Ins. Co.*, 167 F. Supp. 185, 187–188 (E.D. La.)

aircraft's engines) and the United States, on the basis of allegations that, because of negligence on the part of the defendants, the aircraft's engines ingested some birds in flight, causing it to crash. In some of the Massachusetts actions, the Massachusetts Port Authority (operator of the Boston airport) is an additional defendant. Jurisdiction with respect to the United States is based on the Federal Tort Claims Act.

The defendants in the Pennsylvania actions moved to transfer those cases to the Massachusetts court under 28 U.S.C. 1404(a), on the ground that such transfer is required by "the convenience of parties and witnesses" and that it would be "in the interest of justice." The plaintiffs resisted the transfer, some of them on the ground (among others) that, since they had instituted their suits as personal representatives appointed in Pennsylvania but had not qualified in Massachusetts, the District of Massachusetts is not one where these suits "might have been brought," as required by 28 U.S.C. 1404(a).

The district court (Van Dusen, J.) noted that such a transfer will not impose any undue burden on the plaintiffs (App., *infra*, pp. 4a–5a). The court further concluded that the transfer will serve the convenience of the witnesses, observing (1) that most of the survivors, eyewitnesses and other potential witnesses on the issue of negligence reside in the Boston area, (2) that Philadelphia is not more convenient to other potential negligence witnesses than Boston, (3) that all negligence witnesses would be inconvenienced by having to testify at two trials

rather than one, and (4) that, although most of plaintiffs' witnesses on damages come from the Philadelphia area, it is unlikely that many of the suits will go to trial on the damages issue once the liability issue has been determined (App., *infra*, pp. 5a–9a). The court also concluded that the interests of justice require the transfer because (1) consolidation of all cases relating to this single accident will result in fairer and more orderly trials and will save time and expense for the public, jurors and other litigants, (2) the conduct of as few trials as possible on the issues of liability and culpability will avoid duplication and inconsistent results, (3) the District of Massachusetts is the only federal district in which all defendants (including the Massachusetts Port Authority) can be served, (4) the litigation should be tried at the situs of the accident and in a forum more familiar with applicable state law, and (5) the docket of the Massachusetts court is less congested than that of the Pennsylvania court (App., *infra*, pp. 9a–14a).[3]

Rejecting each of the various grounds upon which

[3] The court also listed several reasons why transfer was required under 28 U.S.C. 1404(a) in relation to the government: (a) that, because of the nature of the claims against it, the government should be permitted to bring the Massachusetts Port Authority in as a third-party defendant, (b) that the District of Massachusetts is the only district in which all suits against the government may be brought, (c) that the Massachusetts court is most familiar with the law applicable to the government (*i.e.*, "the whole law of the State where the act or omission occurred") and (d) that limitations on liability imposed by Massachusetts law are not applicable to the government, whatever may be their applicability to other parties (App., *infra*, pp. 19a–20a).

the plaintiffs resisted transfer, the district court concluded that the District of Massachusetts was a district in which these suits "might have been brought," notwithstanding the fact that the plaintiffs had not obtained ancillary appointments as personal representatives in Massachusetts (App., *infra*, pp. 20a–23a). The court concluded that the contention that this was an obstacle to the suits' being brought in Massachusetts was a "legal fiction" which "should not be a basis for rejecting the use of" 28 U.S.C. 1404(a); the court noted that the lack of appointment merely went to a defense that might be raised in the Massachusetts proceeding.[4] Accordingly, the court ordered the requested transfer.

On plaintiffs' petitions for writs of mandamus and prohibition, the court of appeals held that the district court had exceeded its authority in entering the transfer order and directed the issuance of a writ of mandamus. The court reasoned that, under Rule 17(b) of the Federal Rules of Civil Procedure, capacity to sue in federal courts is governed by state law and that, since under Massachusetts law a foreign fiduciary is not qualified to maintain suit in Massachusetts without securing ancillary appointment, such an appointment is a prerequisite to a foreign fiduciary's bringing suit in the District of Massachusetts. Although recognizing that venue and personal jurisdiction would be properly laid in Massachusetts and

[4] The court also stated (App., *infra*, p. 23a) that "[t]he defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions."

acknowledging that ancillary appointment would "quite likely" be granted if applied for (App., *infra*, pp. 32a–33a), the court concluded that the personal representative plaintiffs did not have the "unqualified right" to proceed in Massachusetts and hence that these suits were not suits which "might have been brought" there within the meaning of 28 U.S.C. 1404(a).[5]

REASONS FOR GRANTING THE WRIT

The decision of the court below is, we submit, plainly erroneous and presents an important question of federal procedure which should be decided by this Court.

1. The ruling of the court below is contrary to the manifest purpose of 28 U.S.C. 1404(a) and to the spirit of the decisions of this Court interpreting it. The artificial limitation which the lower court would impose upon transfers to a more convenient forum will plainly lead to "the wastefulness of time, energy and money that § 1404(a) was designed to prevent" and frustrate its "design to protect litigants, witnesses and the public against unnecessary inconvenience and expense." See *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, 26, 27. Moreover, it is

[5] It was brought to the court's attention that in two of the suits before it (*Braff* v. *United States*, C.A. No. 30,304, E.D. Pa., and *Long* (*Reitz*) v. *United States*, C.A. No. 30,303, E.D. Pa.), venue had been improperly laid in the Eastern District of Pennsylvania. As to these suits, apparently relying on 28 U.S.C. 1406(a) (which permits transfer of such a case to the district "in which it could have been brought"), the court held that the transfer to Massachusetts was proper (App., *infra*, p. 34a). See note 11, *infra*.

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based on a technical, formalistic approach to the statute, rather than the liberal "common-sense approach * * * in interpreting § 1404(a)" called for by this Court. *Continental Grain Co.* v. *Barge FBL–585, supra,* 364 U.S. at 24.

Prior decisions of this Court disclose the essential standards governing application of the transfer statute. Its origin in the doctrine of *forum non conveniens* makes it clear that Section 1404(a), like the superseded doctrine, may be applied, within the discretion of the district court, whenever there are two or more forums having jurisdiction over the defendant and venue of the action, see *Hoffman* v. *Blaski,* 363 U.S. 335, 335–336; *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506–507.* From this, and from the liberal purposes of the statute, it follows that considerations other than the existence of jurisdiction and venue in the transferee court will not preclude transfer but are among the factors that the transferor court must take into account in determining the "convenience of parties and witnesses" and the "interest of justice." Cf. *Gulf Oil Corp.* v. *Gilbert, supra,* 330 U.S. at 508–509; *Norwood* v. *Kirkpatrick,* 349 U.S. 29, 32. Transfer to a more convenient forum is not to be impeded by legal technicalities and fictions. *Continental Grain Co.* v. *Barge FBL–585, supra,* 364 U.S. at 23, 26.

On these decisional premises, the court below plainly erred in holding that the District of Massa-

*Of course, such jurisdiction or venue cannot be conferred simply by the defendant's waiver. *Hoffman* v. *Blaski, supra.* See pp. 9–10, *infra.*

chusetts was not a district in which the present suits "might have been brought" for purposes of the transfer statute. As the court recognized (App., *infra*, p. 32a) and as no party disputes, that district has jurisdiction over the defendants, and venue is proper there.[7] The fact that the plaintiffs have failed or refused to seek ancillary appointment there is plainly the sort of legal technicality or fiction rejected in the *Continental Grain* case, *supra*. Such appointment is ordinarily a mere formality: thus, to obtain ancillary appointment in Massachusetts, one need only present an appropriate petition and appoint a resident of Massachusetts as an agent for service of process, Mass. Ann. Laws, Chs. 193, 195, Sec. 8. As the court below acknowledged, "it is quite likely that most of [the plaintiffs] would have been so appointed" (App., *infra*, p. 33a). Moreover, these formalities are not jurisdictional prerequisites to the commencement of suit but may be reflected in a later amendment of the complaint, *Boudreau* v. *New England Transportation Co.*, 315 Mass. 423, 53 N.E. 2d 92. We submit that the decision below, in permitting this purely technical default to preclude transfer, undermines the purpose and operation of 28 U.S.C. 1404(a) and should be reviewed by this Court.

2. There is no support in the decisions of this Court for the lower court's ruling. The court placed reliance upon *Hoffman* v. *Blaski*, 363 U.S. 335 (App., *infra*, pp. 30a–31a); but, as the district court pointed

[7] Such jurisdiction and venue does not depend upon any consent or waiver on the part of the defendants. See note 6, *supra*.

out (App., *infra*, pp. 22a–23a), that decision has no application here. There the Court had before it an attempt to transfer a case to a district where venue was not proper, although the defendant was willing to waive the defect; the Court held, however, that the venue requirement implicit in the statutory phrase, "other district * * * where [the suit] might have been brought," could not be satisfied by waiver or consent.

That the *Hoffman* decision does not govern a case where venue and jurisdiction in the transferee court are proper without consent, and only a formality stands in the way of transfer, was made abundantly clear by this Court's later decision in *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19. There the Court, in holding that a fiction of admiralty law did not preclude transfer under 28 U.S.C. 1404(a), emphasized that its *Hoffman* ruling was limited to a case where "the defendant legally could not have been subjected to suit" in the transferee court (364 U.S. at 21–22)—*i.e.*, where venue or jurisdiction would be improper there. Thus, the present case (in which unconsented venue and jurisdiction are proper in the transferee court), rather than being governed by the *Hoffman* case, rather plainly falls under the "common-sense approach" of the *Continental Grain* case (364 U.S. at 24).

Indeed, the *Hoffman* case suggests one of the strongest reasons for holding that a case like the present is transferable under 28 U.S.C. 1404(a). The Court there refused to allow a defendant, by granting or withholding a waiver of venue, greater freedom of

transfer than a plaintiff would have, on the ground that this would constitute "gross discrimination" (363 U.S. at 344). But the decision below would give a similarly discriminatory power to plaintiffs in representative actions, since it allows them to litigate in the one State in which they have seen fit to qualify, notwithstanding that a district in another State, having jurisdiction over the defendant and venue of the action, would be a more convenient forum.

3. The importance of the question presented by this case is plainly apparent, affecting as it does all representative actions. If the holding below is allowed to stand, the possibility of consolidating multiple claims arising out of major disasters—such as airplane accidents[8]—will be virtually eliminated.[9] To borrow this Court's words, that holding "would practically scuttle the *forum non conveniens* statute" with respect to representative actions and would "provide a shelter" for such actions "in costly and inconvenient forums" (*Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 24, 27).

At the same time, adoption of the lower court's construction of 28 U.S.C. 1404(a) would, by fore-

[8] As of December 31, 1962, there were pending in the various federal district courts over 420 Federal Tort Claims Act cases arising out of airplane crashes or mid-air collisions. Of these, 274, or more than 60 percent, are cases filed in multiple jurisdictions throughout the country, although all 274 arise out of 6 airplane disasters. One of these 6 accidents has led to suits in as many as nineteen district courts.

[9] As petitioners in No. 738 point out (Pet. 8), only a small minority of the States permit a foreign fiduciary to obtain judgment on the basis of his foreign appointment.

closing transfer and consolidation for trial before a single tribunal, saddle federal trial courts with an unnecessary workload in a vast number of multiple lawsuit situations arising out of a single occurrence, and thus make even more difficult the proper, efficient and expeditious administration of the federal court system.[10] It is to be noted, too, that the decision below would have application beyond 28 U.S.C. 1404(a); for example, it is difficult to see why it would not be equally applicable with respect to 28 U.S.C. 1406(a), which authorizes the transfer of a case from a district in which venue was improperly laid to one "in which it could have been brought."[11]

In the circumstances, the need for review of the decision below is compelling.

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[10] The Director of the Administrative Office of the United States Courts, in his 1962 Annual Report (p. I–14), notes that multiple jurisdiction suits "involve production of substantially the same witnesses" and documents so that "chaos would result if all the courts having such suits" attempted to proceed at the same time.

[11] Presumably on the basis of 28 U.S.C. 1406(a), the court below approved the transfer to Massachusetts of two cases in which venue had been improperly laid in the Eastern District of Pennsylvania (see note 5, *supra*), notwithstanding that the plaintiffs had not qualified as personal representatives in Massachusetts. Counsel for the plaintiffs, recognizing the complete inconsistency between this action and the court's holding with respect to the other cases, have asked the court to modify its opinion to withdraw approval of the transfer of these two cases. The court has not yet acted on these requests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX

In the United States District Court For the Eastern District of Pennsylvania

CIVIL ACTIONS Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30257, 30258, 30259, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344, and 30346

AND

Nos. 321, 323, 325, 327, 329, 335 and 375 of 1961 in Admiralty

SIDNEY W. POPKIN

v.

EASTERN AIR LINES, INC., AND LOCKHEED AIRCRAFT CORP., AND GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C.A. 28664) and 11/1/61 (Document No. 7 in C.A. 29724), except Civil Actions Nos. 30390 and 30391

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Opinion sur motions to transfer

VAN DUSEN, J. APRIL 6, 1962.

These 55 cases,[1] involving fatal and, as to three plaintiffs, non-fatal injuries suffered when an Electra airplane manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern, crashed approximately one minute after take-off in Boston Harbor on October 4, 1960, are before the court on Motions to Transfer under 28 U.S.C.A. § 1404(a). There are 114 similar cases pending in the United States District Court for the District of Massachusetts (see Document No. 30 in C.A. 30078). The record in these cases (see, particularly, statements of Lee S. Kreindler, Esq. at the argument) indicates that the primary basis for liability on which the plaintiffs presently rely is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved in this suit, as well as in engines of other planes using the Logan International Airport, Boston, at about the time of the accident.

In *Jurgelis* v. *Southern Motors Express*, 169 F. Supp. 345 (E.D. Pa. 1959), this court said:

[1] There are 28 plaintiffs involved in these 55 cases, since 13 plaintiffs have filed two suits in this court and 7 plaintiffs have filed three cases in this court resulting from the injuries received in the October 4, 1960, airplane accident at Boston, Mass. Only one of the 114 cases in the Massachusetts District Court is an admiralty action, whereas 7 of these cases are suits in admiralty brought by the same parties who have also filed Civil Actions in this court.

Wherever "plaintiffs" is used, it includes libellants and wherever "defendants" is used it includes respondents.

One of these cases has already been transferred due to improper venue (C.A. 30307).

In *Norwood* v. *Kirkpatrick*, 1955, 349 U.S. 29, * * * the Supreme Court, in discussing the relation of 28 U.S.C.A. § 1404(a) to the doctrine of forum non conveniens as recognized by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 1946, 330 U.S. 501, * * * said at page 32 * * *:

"* * *, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

It appears, therefore, that under the present state of the law, the factors to be considered by a court in determining whether or not to transfer the action under §1404(a) are established by the Gulf Oil Corp. case,[2] and the degree

[2] In the *Gulf Oil Corp.* v. *Gilbert* case, supra, the court said at pp. 508–9:

"* * * An interest to be considered and the only likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when

> of discretion to be exercised by the court is established by the Norwood case.

The last sentence quoted above was approved by Chief Judge Biggs, sitting specially in this court, in *Medich* v. *American Oil Company*, 177 F. Supp. 682, 683 (E.D. Pa. 1959). See, also, *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (3d Cir. 1952), where the court said at page 1011:

> The statute limits the privilege of the plaintiffs to have his lawsuit tried in the forum of his choosing if he can there get jurisdiction over the defendant. The purpose of the limitation is clearly to make the inevitably uncomfortable (for the litigant) judicial process cheaper and more convenient and, if possible, more prompt.

After consideration of the record in these cases, the undersigned has concluded that transfer is required under 28 U.S.C.A. § 1404(a), as follows:

I. Convenience of the parties

In this case, plaintiffs claim their convenience would be served by a trial in this District and the defendants claim that it would be more convenient for them to have these cases tried in the District of Mas-

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litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

sachusetts.[3] The burden on the survivor-plaintiffs of presenting their damage testimony in the transferee District has not been overlooked, but this is a burden often falling upon persons who, having elected to travel away from home, are involved in accidents and must have been considered by Congress in enacting 28 U.S.C.A. § 1404(a). None of the affidavits allege that any of the plaintiffs is impecunious, nor is their financial condition stated in the record.

II. Convenience of witnesses

The record makes clear that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability and of degree of culpability of the defendants.[4] The Collins

[3] There is nothing in 28 U.S.C.A. § 1404(a) which precludes transfer because the plaintiff is a resident of the transferor District. See, for example, *Norwood* v. *Atlantic Coast Line RR. Co.*, C.A. 15810, p. 4 of opinion of then Chief Judge (now Senior Judge) Kirkpatrick dated 7/12/54, petition for writ of mandamus and prohibition denied (3rd Cir., No. 11,364, on 7/16/54), aff'd. sub. nom. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955); *Harry Winston, Inc.* v. *Zale Jewelry Company*, 191 F. Supp. 686 (S.D.N.Y. 1961); *Huff* v. *Nashville, Chattanooga & St. Louis Ry.*, 88 F. Supp. 735 (S.D.N.Y. 1949). As stated in *Brown* v. *Woodring*, 174 F. Supp. 640, 645 (M.D. Pa. 1959):

"'Defendant's mandatory margin for victory * * * need not be an overwhelming one.' A court should not hestitate to disturb plaintiff's choice of forum if the three statutory factors dictate transfer."

[4] The Massachusetts Death Act, in relevant part, provides:

"A person who (1) by his negligence causes the death of a person * * *, or (2) by wilful, wanton or reckless act causes death of a person * * *, or (2) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger * * *, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability. * * * A

Affidavit (Document No. 31 in C.A. 28664) alleges that (a) all but six of the 47 eye witnesses to the accident known to General Motors reside in the District of Massachusetts and within 25 miles of Boston (par. 12);[5] (b) four of ten survivors of the crash reside in the District of Massachusetts and within 60 miles of the center of Boston;[6] (c) four employees of the Logan Airport who prepared the plane for flight reside in the vicinity of Boston; (d) seven operators of the control tower at Logan International Airport, who were eye witnesses to the aircraft's flight and crash and who would know the time of the take-off and crash, reside within 25 miles of center city Boston (see par. 15 of Document No. 31 in C.A. 28664); (e) all but one of the six experts who first examined the bodies of the dead birds reside within twelve miles

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person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages are to be assessed with reference to the degree of culpability of his agents or servants."

Mass. Ann. Laws, c. 229, §2 (Suppl. 1961).

[5] The second sentence of this paragraph states: "These witnesses observed the takeoff, flight and crash of the aircraft and would be able to testify to its flight path, describe the nature of its flight and crash and furnish testimony relevant to the time interval between takeoff and crash."

[6] In par. 13 of this Affidavit, it is alleged that these witnesses would be able to testify as to the course of the plane's flight, the sound of its engines, and the results of the crash. In par. 4 of the unsworn answer to the Motions of Transfer filed by plaintiffs in Civil Actions Nos. 28664, 29881, 29882, 29883, 29884, 29901, 30300, 30307 and 30344 and Nos. 321, 323, 325, 327, 329, 335 and 337 of 1961 in Admiralty, it is alleged that Major Sylvester Koenig resides in Greenville, S.C. (Document No. 35 in C.A. 28664), rather than Falmouth, Mass., as alleged in this paragraph 13, but the residence of this survivor of the crash is not stated in any affidavit filed by plaintiffs.

of center city Boston and the sixth such expert resides in New Hampshire, approximately 60 miles from Boston (see par. 17 of Document No. 31 in C.A. 28664); and (f) five other potential witnesses having knowledge of the presence of birds at the airport, and some of whom discovered dead birds at the airport, reside within 25 miles of Boston (see pars. 16 and 18 of Document No. 31 in C.A. 28664).[7] Also, it is clear that it will be more convenient for such witnesses if there is to be one trial, rather than several, and if the discovery can be conducted under the supervision of one court.[8] Cf. *MacAlister* v. *Guterma*, 263 F. 2d 65, 68–70 (2nd Cir. 1958).

Plaintiffs have not filed any affidavits contradicting the above sworn allegations, but have emphasized, generally, without listing any additional, specific witnesses in their affidavits (except for six individuals listed without specifying the area of their testimony in Document No. 35 in C.A. 28741 and five individuals listed as damage witnesses for one plaintiff in Document No. 29 in C.A. 30078), that most of their compensatory damage witnesses come from this district or near it.[9] Experience in this and other Districts

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[7] The Wickenhaver Affidavit lists some of the same witnesses as those referred to above in the Collins Affidavit. See Exhibit B to Document No. 30 in C.A. 28664. In par. 8 of that Affidavit, there is named an additional witness as to the birds living in the transferee District (John J. Phelan, of Winthrop, Mass.).

[8] Since the United States of America is one of the defendants, the only District in which all the actions can be consolidated for trial is Massachusetts. See 28 U.S.C.A. § 1402(b), providing that the United States may only be sued "where the plaintiff resides or wherein the act or omission complained of occurred."

[9] For example, the McConnell Affidavit (Document No. 29 in C.A. 30078) lists six compensatory damage witnesses that plaintiff Ward wishes to call "from this area" and does not

indicates that, once the issues of liability have been determined, relatively few of a large group of cases such as these, resulting from one accident, go to trial on the damage issues. Furthermore, as indicated below, there are several legal hurdles the personal representative plaintiffs have to overcome before compensatory damages become pertinent in their cases.[10]

Some plaintiffs also stated in their affidavits that they seek to establish that the accident occurred as the result of negligent design and testing of the engines by General Motors, negligent design and testing of the aircraft by Lockheed, negligent testing of the aircraft, as well as negligent training and physical examinations of the flight personnel, by Eastern, and negligence of the Government in execution of its responsibility for flight safety. See par. 8 of Document No. 29 in C.A. 30078. At the argument, it was admitted that plaintiffs hoped that the Government agency investigating the crash would be able to show faulty design and testing of the aircraft and its engines, but no definite finding to this effect has been made over 18 months after the crash. Hence, there is nothing specific on the record to show that any large number of witnesses from outside the Boston area, and for whom the transferor District would be more convenient than the transferee District, will be required for the trial of the above-mentioned issues of liability and degree of culpability. Employees of

deny that he was also hospitalized in the Boston area or that medical witnesses from that area could present helpful evidence on the issue of damages—see, also, Affidavits attached to Document No. 35 in C.A. 28664 and Documents Nos. 34 and 35 in C.A. 28741.

[10] If agreement on damages cannot be secured in the cases against the Government, it is most probable that the Government would agree to a determination of the damage issues by this court.

the defendants from California and Indiana, referred to at page 10 of the Kreindler Affidavit, being Document No. 12 in C.A. 29724, would not be substantially inconvenienced any more by a trial in Philadelphia than one in Boston,[11] but it is clear that they will be inconvenienced by having to testify at trials in both places, as opposed to one trial in Boston (see footnote 8 above, showing that the transferee District is the only place where there can be a single trial). Employees of the Civil Aeronautics Board, Bureau of Safety, will similarly have to testify in the District of Masachusetts in any event and, if the transfer of these 55 cases is denied, they will have to attend another trial in this District.

III. The interest of justice

The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others:

(1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial

See *MacAlister* v. *Guterma, supra,* at 68–70; *O'Donnell* v. *Watson Bros. Transportation Company,* 183 F. Supp. 577 (N.D. Ill. 1960); and cases cited in those cases. With reference to the argument in the attached letter of January 11, 1962 (based on a letter from the Clerk of the Massachusetts District dated January 9, 1962, which is also attached), that "there is nothing to be gained administratively by the transfer of these matters to Boston," the United States

[11] A trial in this District would be less convenient for defendants since it would require them to transport their employees to testify at least twice from the west or mid-west to the eastern part of this country.

District Court for the District of Massachusetts has informed the undersigned that all the cases arising out of this accident have been assigned to one judge, who is handling all such cases for purposes of proceedings prior to trial and will consider possibilities of severance of issues for trial, as well as consolidation for trial, at the appropriate time.[12] As pointed out in *Kelly* v. *Greer*, 295 F. 2d 18, 21 (3d Cir. 1961), even after a consolidation order has been entered, it "does not freeze the future conduct of the litigation."

(2) The conduct of as few trials as feasible on the issues of liability and culpability

The purpose of the Federal Rules of Civil Procedure was to encourage consolidation wherever this was fair and possible. See *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F. 2d 839, 851 (1st Cir. 1947); *United States* v. *Knauer*, 149 F. 2d 519 (7th Cir. 1945), aff'd. 328 U.S. 654 (1946); cf. *Walker* v. *Loop Fish & Oyster Co.*, 211 F. 2d 777, 780–1 (5th Cir. 1954); *Howey* v. *Yellow Cab Co.*, 181 F. 2d 967, 973 (3d Cir. 1950), aff'd. sub. nom. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). In the *Howey* case, *supra*, the court said at page 973:

> Surely the stricture of the Sherwood case * * *, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge.

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[12] Paragraph 8 of the Lockwood Affidavit (Document No. 30 in C.A. 30078) refers to the normal progress of a case in the United States District Court for the District of Massachusetts, whereas the court has informed the undersigned that this case is being treated as a protracted case and not "in the normal course." See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960).

Federal trial courts have consistently recognized the fairness and desirability of consolidating cases for trial, particularly on the issue of liability. See *Weitort* v. *A. H. Bull & Company*, 192 F. Supp. 165 (E.D. Pa. 1961); *Hassett* v. *Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md. 1959); *Polak* v. *Koninklijke Luchtvaart Maatschappij, etc.*, 19 F.R.D. 87 (S.D.N.Y. 1956); and cases cited in those cases. In the *Polak* case, *supra*, the court said at page 88:

> The advantages of consolidating multiple claims arising from a single accident outweigh even the considerations requiring strict enforcement of the rules on jury demand. * * * [Citing case.] Recent experience with the trial of such consolidated claims in this court indicates that almost invariably the only evidence peculiar to each claim is that relating to damages. Most of the trial court's time is consumed by the trial issues common to all of the cases. Considerations of expense as well as the convenience of witnesses, litigants and the Court, and the expeditious dispatch of judical business, impel consolidation under such circumstances.

In the *Hassett* case, *supra*, involving five actions arising out of one accident, the court said at page 664:

> * * * it will save time for parties, witnesses, counsel and courts, to have the entire matter disposed of at one trial. * * *
>
> The five cases should be consolidated for trial under Rule 42(a), but, as permitted by Rule 42(b), the jury shall first hear the evidence on the issue of liability and decide that issue for all the cases.

It is neither fair nor just that there should be a different liability result for some of these plaintiffs than there is for others. Transfers under 28 U.S.C.A. 1404(a) have resulted from the desirability of consoli-

dating the transferred cases for trial with other similar cases pending in the transferee District. See *A/S Dampskibsselskabet Svendbord* v. *United States*, 116 F. Supp. 603 (E.D. Tex. 1953), where the court said at page 606:

> However, a more important consideration, it would seem, is that all of the facts and circumstances necessary to determine the rights of the parties will have to be presented both there and here at different times, and it is possible that the two Courts could reach conflicting conclusions; whereas if the case filed here is transferred, it can be consolidated with those in the Southern District of New York and all rights determined in a single trial without the possibility of such a conflict.

See, also, *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, 21 (1960); *Cressman* v. *United Air Lines*, 158 F. Supp. 404 (S.D.N.Y. 1958); *Winsor* v. *United Air Lines*, 153 F. Supp. 244 (E.D.N.Y. 1957).

Recently, the United States Court of Appeals for the Second Circuit has emphasized the desirability of consolidation of separate actions involving common questions of law and fact for purposes of pre-trial and trial under the supervision of one judge or master. See *MacAlister* v. *Guterma*, *supra*. In *Crosley* v. *Hazeltine Corporation*, 122 F. 2d 925 (3d Cir. 1941), the United States Court of Appeals for the Third Circuit said at page 930:

> It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. * * * The economic waste involved in duplicating litigation is obvious. Equally im-

portant is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.

(3) The District of Massachusetts is the only federal jurisdiction where all defendants can be served

The defendants (particularly the United States of America and Eastern Air Lines, Inc.) emphasized at the argument that they wish to join the Massachusetts Port Authority (owner and operator of the Boston Airport) as a third-party defendant and service can only be obtained on that entity in the District of Massachusetts (see page 4 of Kreindler Affidavit, Document No. 12 in C.A. 29724). This court has consistently recognized that the ability to join a third-party defendant in the transferee forum is a consideration in favor of transfer. See *Allied Petro Products Incorporated, etc.* v. *Maryland Casualty Company*, C.A. No. 30180, and cases cited at pages 3–4 of Opinion of 12/22/61 (Document No. 7). The unfairness which can result from different results in separate trials of actions arising from the same accident is illustrated in cases such as *Curtis* v. *A. Garcia Y. Cia*, 272 F. 2d 235 (3rd Cir. 1959), where differing records in two trials produced a liability result for defendant and third-party defendant which it is quite possible that neither fact finder would have reached if both actions had been considered at the same trial.

(4) Other reasons favoring transfer of the cases in the interest of justice

In addition to the above factors favoring the transferee District as the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had, the following factors mentioned by the United States Supreme Court in *Gulf Oil Corp.* v. *Gilbert* (see second paragraph quoted in footnote 2, *supra*) favor trial in the transferee District:

> "(a) The litigation will be handled "at its origin," rather than in this court, the docket of which is more congested than that of the transferee District (see par. 7 of Wickenhaver Affidavit, being Exhibit B to Document No. 31).
>
> (b) The trial of the issues of liability and culpability will be held "in a forum that it as home with the state law."

One of the principal arguments of the personal representative plaintiffs who oppose the transfer is that they will be deprived of the benefits of the public policy embodied in the Pennsylvania Constitution (particularly Article I, Section 11, and Article III, Section 21) if these cases are transferred. Cf. § 612 of Restatement of Conflicts of Law. This argument against transfer is rejected for these reasons, among others:

A. There is no reason to believe that a Federal Judge, sitting in Massachusetts, will not be just as able in selecting and interpreting the applicable law as such a judge sitting in Pennsylvania will be

The Supreme Court of the United States has recently stated: "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties." *Richards* v. *United States*, 369 U.S.

(1962).[13] In view of the possibility that the decision in the cases pending in the Pennsylvania State Courts referred to under B below may make moot the argument against application of the above-quoted rule in this case, it is not necessary to decide at this time such questions argued by counsel as the application to this situation of §§ 384, 391 (comment d), 412, 517 and 612 of the Restatement, Conflict of Laws, and as, when a case is transferred under 28 U.S.C.A. § 1404 (a) does the transferee court determine the rights of the parties on the basis of the law that would have been applied in the District where the suit was originally filed. See *Headrick* v. *Atchison, T. & S.F. Ry. Co.*, 182 F 2d 305, 309–310 (10th Cir. 1950); *Gomez* v. *The SS. Dorothy*, 183 F. Supp. 499, 512 (D. Puerto Rico 1959); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F. Supp. 681, 684 (W.D. Ky. 1957); *Greve* v. *Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. New Mex. 1959);[14] and authorities cited in those cases. The transferee court will be better able to pass on these questions, if necessary, after decision of the cases pending in the Pennsylvania State Courts mentioned in footnote 20 below.

B. Contention that Pennsylvania public policy prevents enforcement of the measure of recovery but accepts the right of action provided in the Massachusetts Wrongful Death Act should not be ruled upon at this time

Relying on (1) a recent dictum of four out of seven justices of the New York Court of Appeals

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[13] It is noted that in referring to the rule of some states "to take into account the interests of the State having significant contact with the parties to the litigation," the court did not refer to any Pennsylvania or Massachusetts cases in footnote 26 of its opinion (see page—of 369 U.S.).

[14] In this case, the court used this language at page 414:

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a change of venue affects the place of trial only."

in *Kilberg* v. *Northeast Air Lines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 526 (1961), to support the application of Article 3, § 21, of the Pennsylvania Constitution,[15] (2) an older Pennsylvania Supreme Court case. [*Passenger Railway Co.* v. *Boudreau*, 92 Pa. 475, 481–2 (1880)] to support the application of Article 1, § 11, of the Pennsylvania Constitution [16] and (3) general language in Pennsylvania cases that foreign penal statutes will not be enforced in Pennsylvania courts,[17] the personal rep-

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[15] Article 3, § 21, provides:

"* * * in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Article 1, § 18, of the New York Constitution, relied on in the *Kilberg* case, *supra*, provides: "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations." It is noted that in view of the reasoning used to support the majority's dictum in the *Kilberg* case, the same result might not be applicable to defendants such as Lockheed and General Motors, which are not common carriers who sold tickets in the forum to domiciliaries or residents of the forum.

[16] Article 1, § 11, of this Constitution provides:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[17] *Nesbitt* v. *Clark*, 272 Pa. 161 (1922); *Commercial Nat. Bank* v. *Kirk*, 222 Pa. 567 (1909). Although language in *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 132 (1956), is relied on to establish that the Massachusetts Wrongful Death Act is penal, the Pennsylvania appellate courts have recognized that the words "penal" and "penalty" have different shades of meaning. See *Commonwealth* v. *Musser Forests, Inc.*,

resentative plaintiffs contend that they are entitled to recover compensatory damages without limit in these actions because of the alleged, strong Pennsylvania public policy opposed to the $20,000 limit in the Massachusetts Wrongful Death Act. Defendants argue that neither the Pennsylvania appellate court nor the Federal decisions have applied such a public policy to invalidate such foreign state limitations on recovery in the past. See, for example, *Slater* v. *Mexican National R.R. Co.*, 194 U.S. 120 (1904); *Knecht* v. *United States*, 242 F. 2d 929 (3rd Cir. 1957); *Rennekamp* v. *Blair*, 375 Pa. 620 (1954); cf. *Hughes* v. *Railroad Co.*, 202 Pa. 222, 228–9 (1902); and *Quaker Mills Corp.* v. *Howard Corp.*, 131 Pa. Super. 1, 8–9 (1938).[18] Also, defendants contend that

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394 Pa. 205, 146 A. 2d 714 (1958); *Laughlin et al.* v. *Baltalden, Inc.*, 191 Pa. Super. 611, 617–8 (1960); cf. *Ward* v. *Rice*, 29 F. Supp. 714 (E.D. Pa. 1939). The Pennsylvania appellate courts have also recognized that there is a strong public policy in enforcing rights and duties validly created by foreign law. See *Personal Fin. Co.* v. *Gen. Fin. Co.*, 133 Pa. Super. 582, 585–6 (1938).

[18] In the *Hughes* case, the court used this language at pp. 228–9:

"Where a contract containing a stipulation limiting liability for negligence, is made in one state, but with a view to its performance, by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state, where its negligent breach, causing injury occurs. If such a contract comes under construction, in a state like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in *Forepaugh* v. *R.R. Co.*, and in *Fairchild* v. *R.R. Co.* But if the injury has taken place within its limits, it will declare the contract null and void, as in *Burnett* v. *R.R. Co.* In the *Fairchild* case, as the injury occurred in Maryland, this court enforced the law of that state; if the injury to the horse had been

the full faith and credit clause requires Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, relying on *First Nat. Bank* v. *United Air Lines*, 342 U.S. 396, 400-401 (1952); *Order of Travelers* v. *Wolfe*, 331 U.S. 586 (1947); *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145, 160 (1932). Finally, defendants argue that if this Massachusetts Act may not be applied in these cases, there can be no recovery at all, since the plaintiffs have no remedy.

However, in accordance with the repeated statements of the Supreme Court of the United States that District Courts should abstain from deciding issues involving the Constitution and public policy of a state so as to afford the state courts a reasonable opportunity to decide such matters,[9] the determination of the

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delayed until in the course of the journey, it had reached Pennsylvania, our own law of public policy would have controlled." This approach seems different than the New York law, as exemplified in the *Conklin* case, relied on in the majority opinion in *Kilberg* at page 528 of 172 N.E. 2d.

[9] See *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-8 (1959); *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25 (1959); and cases cited in Note, "Abstention: An Exercise in Federalism," 108 U. of Pa. Law Rev. 2226 (1959). In the *Thibodaux* case, the court said at page 27: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." In the *Harrison* case, the court said at page 176:

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' *Matthews* v. *Rodgers*, 284 U.S. 521, 525, as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.'"

law governing the measure of damages in these actions should be postponed until the trial on the issues of liability and culpability has been completed. Meanwhile, a Pennsylvania appellate court decision may become available to enlighten us on the public policy of this Commonwealth in this situation, since there are two cases pending in the state courts in which there will be an opportunity for the foregoing contention to be submitted to the Pennsylvania courts.[20]

Abstention of decision on this aspect of the case at this time will also prevent a premature decision on the Constitutional issue of the application of the full faith and credit clause.[21] Cf. *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496, 501 (1941).

Finally, it should be noted that the considerations stated in 28 U.S.C.A. § 1404(a) require the transfer of the actions brought against the Government for these reasons, among others:

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[20] It is noted that two actions previously pending in this court (C.A. Nos. 30390 and 30391) have been remanded to the state court and are now pending there (Court of Common Pleas No. 4 of Philadelphia County, Sept. Term 1961, No. 237, and Court of Common Pleas No. 6 of Philadelphia County, Sept. Term 1961, No. 238).

[21] Also, it is noted that the application of the Full Faith & Credit Clause to the dictum of the majority in the *Kilberg* case is raised by an appeal now pending in the United States Court of Appeals for the Second Circuit from *Pearson, etc.* v. *Northeast Airlines, Inc.*, Civ. 147-142 in the U.S. District Court for the Southern District of New York, Opinion and Order filed 11/15/61. Counsel have informed the court that the New York District Court reached a contrary decision to *Pearson, supra*, in *Trauth* v. *Northeast Airlines, Inc.* (S.D.N.Y., C.A. 149-256, 1961), where a New Jersey citizen was plaintiff, on the ground that New Jersey's policy differed from that of New York. An excerpt from the transcript of the court's statements in *Trauth, supra*, is appended to the attached letter of 1/9/62 from counsel for General Motors.

(a) The basis of the claims against the Government makes it only fair that it be permitted to bring in as a third-party defendant the Massachusetts Port Authority, as operator of the airport.

(b) The District of Massachusetts is the only District where all the suits against the Government may be brought (see footnote 8 above);

(c) The Massachusetts Federal Court is most familiar with "the whole law of the State where the act or omission occurred" which must be applied in the suits against the Government, see *Richards* v. *United States, supra,* at page—; and

(d) There is no contention that the above-mentioned public policy contained in the Pennsylvania Constitution applies to these Government suits, which are not governed by the measure of damages in the Massachusetts Wrongful Death Act.

The many factors dictating transfer of the cases against the Government (19)[22] must be considered as a factor favoring transfer of the other cases pending in this District, so that all cases arising from this accident may be treated uniformly by the court which must dispose of the great majority of such cases.

Plaintiffs in C.A. 30078, C.A. 30346 and C.A. 30284 contend that these wrongful death actions may not be transferred under 28 U.S.C.A. § 1404(a) since they were not appointed as personal representatives in Massachusetts and, hence, could not have brought actions there,[23] relying on *Hoffman* v. *Blaski,* 363 U.S. 335 (1960). However, the Supreme Judicial Court of Massachusetts has held that a foreign personal rep-

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[22] Civil Actions Nos. 28764, 28788, 28789, 29100, 29161, 29162, 29275, 29616, 29901, 30230, 30257, 30258, 30263, 30302, 30303, 30304, 30305, 30306 and 30343.

[23] See *Boutillier* v. *Wesinger,* 322 Mass. 495, 496, 78 N.E. 2d 195 (1948).

resentative may bring a suit under the wrongful death act and later qualify in the forum,[24] even though the Statute of Limitations has run at the time of such later qualifications,[25] in *Boudreau* v. *New England Transportation Company*, 315 Mass. 423, 426–7, 53 N.E. 2d 921, where the court said:

> Even apart from any admission under G.L. (Ter. Ed.) c. 231, § 30, this is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured.

Although this is a close question, this contention of plaintiffs is rejected for these reasons:

A. *The District of Massachusetts is a District where Congress designated litigation of this type might be brought*

The appropriate Congressional Title of the United States Code (Title 28 covering "Judiciary and Judicial Procedure") provides in Chapter 85 (District Courts; Jurisdiction) at Section 1332(a) and in Chapter 87 (District Courts; Venue) at Sections 1391(a) and (c) and 1402(b) for institution of these actions in the District of Massachusetts.

In determining where a suit might have been brought, the dissenting opinion in *Paramount Pic-*

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[24] See Mass. Gen. Laws, Ch. 193, §§ 1 & 2, Ch. 194, § 5, Ch. 195, § 8, Mass. Ann. Laws, Ch. 204, § 3.

[25] Cf. *Brennan* v. *Rooney*, 139 F. Supp. 484, 486–7 (E.D. Pa. 1956).

tures v. *Rodney*, 186 F. 2d 111, 116 (3d Cir. 1951), which was quoted with approval in *Hoffman* v. *Blaski*, *supra*, at 343, states:

> The district judge * * * had to decide whether the Northern District of Texas was a place where the suits "might have been brought." A reasonable and obvious way of determining this was to see whether Congress in some other statute had designated the places where litigation of this sort might be brought.
>
> * * * * * *
>
> This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation. (pp. 116 & 118).

B. A "common-sense approach" in interpreting Section 1404(a) of Title 28 to accomplish its purposes requires a construction that these cases "might have been brought" in the District of Massachusetts. See Continental Grain Co. v. Barge FBL-585, supra

For the reasons stated above, it is "in the interest of justice" and "for the convenience of * * * witnesses" that these actions be transferred to the District of Massachusetts. Under such circumstances, legal fictions such as the state which has authorized a personal representative to act should not be a basis for rejecting the use of 28 U.S.C.A. § 1404(a). See *Continental Grain Co. v. Barge FBL-585, supra*, at 22-24. In distinguishing *Hoffman* v. *Blaski, supra*, the court said at page 22 of the *Barge FBL-585 case:*

> Those cases involved transfers in which the plaintiffs filing the suits would have had no

right whatever to proceed originally against the defendants on the "civil actions" in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the grain company to subject the owner of the barge, with or without its consent, to a "civil action" in Memphis at the time the New Orleans action was brought.

In applying 28 U.S.C.A. § 1404(a), courts do not consider all the defenses which might have been, or be, raised in the transferee forum and decide whether an action might have been successfully brought there.[26] See *Greve* v. *Gibraltar Enterprises, supra,* at 412–3; cf. *Ackert* v. *Bryan,* — F. 2d —, 30 L.W. 2310 (2nd Cir. 1962).

The defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions. See *Greve* v. *Gibraltar Enterprises, supra,* at 414.[27]

(S) FRANCIS L. VAN DUSEN, J.

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[26] It is noted that "It is not necessary to aver the capacity of a party to sue or * * * the authority of a party to sue * * * in a representative capacity * * *" but such matters must be raised "by specific negative avertment. * * *" See F.R. Civ. P. 9(a).

[27] There are attached to this opinion letters from counsel dated January 9, January 11, January 12 and February 14 with enclosures (including copy of letter of January 9, 1962, from the Clerk of the U.S. District Court for the District of Massachusetts, which was enclosed with the letter of January 11).

In the United States District Court
for the Eastern District of Pennsylvania

CIVIL ACTIONS Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344, and 30346

SIDNEY W. POPKIN

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP. and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C.A. 28664) and 11/1/61 (Document No. 7 in C.A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions

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Order Sur Motions to Transfer

(Documents Nos. 28, 29 & 30 in C.A. 28664; Nos. 30, 31 & 32 in C.A. 28741; Nos. 23, 24 & 25 in C.A. 28762; Nos. 26, 27 & 28 in C.A. 28763; Nos. 13 & 15 in C.A. 28764; Nos. 13 and 15 in C.A. 28788; Nos. 13 & 15 in C.A. 28789; Nos. 22, 23 & 24 in C.A. 29099; Nos. 12 & 14 in C.A. 29100; Nos. 22, 23 & 24 in C.A. 29159; Nos. 22, 23 & 24 in C.A. 29160; Nos. 11 & 13 in C.A. 29161; Nos. 11 & 13 in C.A. 29162; Nos. 22, 23 & 24 in C.A. 29274; Nos. 12 & 14 in C.A.

29275; Nos. 20, 21 & 22 in C.A. 29615; Nos. 9 & 11 in C.A. 29616; No. 9 in C.A. 29274; Nos. 15, 16 & 17 in C.A. 29768; Nos. 15, 16 & 17 in C.A. 29881; Nos. 15, 16 & 17 in C.A. 29882; Nos. 15, 16 & 17 in C.A. 29883; Nos. 15, 16 & 17 in C.A. 29884; Nos. 8 & 11 in C.A. 29901; Nos. 21, 22 & 23 in C.A. 30078; Nos. 20, 21 & 22 in C.A. 30079; Nos. 11, 12 & 13 in C.A. 30200; No. 7 in C.A. 30230; No. 2 in C.A. 30258; Nos. 12, 13 & 14 in C.A. 30260; No. 2 in C.A. 30263; Nos. 9, 10 & 13 in C.A. 30266; Nos. 15, 16, 17 & 24 in C.A. 30284; No. 6 in C.A. 30288; No. 6 in C.A. 30289; Nos. 13, 14 & 15 in C.A. 30300; Nos. 13, 14 & 15 in C.A. 30301; No. 11 in C.A. 30302; No. 4 in C.A. 30303; No. 2 in C.A. 30304; No. 11 in CA. 30305; No. 2 in C.A. 30306; No. 12 in C.A. 30343; Nos. 13, 14 & 15 in C.A. 30344; Nos. 15, 16 & 17 in C.A. 30346)

AND NOW, April 6, 1962. IT IS ORDERED that the above-captioned cases are TRANSFERRED to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C.A. §1404(a).

(S) FRANCIS L. VAN DUSEN, J.

See Opinion filed earlier today.

United States Court of Appeals for the Third Circuit

Nos. 13994, 13997, 14003, 14011, 14033

ROBERTA BARRACK, ADMX., ETC., ET AL., PETITIONERS IN No. 13994

SIDNEY W. POPKIN, ET AL., PETITIONERS IN NO. 13997

HOWARD H. RAPP, ADMR., ETC., ET AL., PETITIONERS IN No. 14003

LEAH BIERNBAUM, EXTRS., ETC., ET AL., PETITIONERS IN No. 14011

DORIS A. LAISTER, EXTRX., ETC., ET AL., PETITIONERS IN No. 14033

v.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, RESPONDENT

and

EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION AND THE UNITED STATES OF AMERICA, INTERVENORS

ON PETITIONS FOR WRITS OF MANDAMUS OR PROHIBITION

Argued October 2, 1962

Before STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*

Opinion of the Court

(Filed November 19, 1962)

By STALEY, *Circuit Judge*.

Petitioners seek writs of mandamus or prohibition directing respondent to vacate and set aside his order transferring these actions to the United States District Court for the District of Massachusetts. The order was entered pursuant to § 1404(a) of 28 U.S.C.,[1] but has been stayed pending the disposition of these petitions.

The actions arise out of the crash of an Eastern Air Lines Electra airplane in Boston Harbor on October 4, 1960. These suits were filed in the District Court for the Eastern District of Pennsylvania by two survivors of the crash and by the personal representatives of several deceased passengers. Named as defendants were Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corp., and in several instances, the United States. On April 6, 1962, respondent entered an order granting defendants' motions for transfer pursuant to an opinion filed that same day.[2]

With respect to the death actions, petitioners assert that respondent was without power to enter the order of transfer because the Massachusetts District Court

[1] "§ 1404. *Change of venue*

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1958 ed.).

[2] The opinion is reported at 204 F. Supp. 426.

is not a district where these actions "might have been brought" within the meaning of § 1404(a). Additionally, they argue that because the transferee forum may apply a different rule of substantive law to these suits,[3] the order should be vacated as a matter of law. Lastly, they contend that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have power to transfer these actions, we find it unnecessary to consider petitioners' alternative arguments.

At the outset, we are faced with defendant-intervenors' contention that the petitions for writs of mandamus or prohibition are inappropriate in these circumstances. It must be noted that respondent does not join in presenting this argument.

Our recent decision in *Swindell-Dressler Corp.* v. *Dumbauld*, — F. 2d — (C.A. 3, 1962), makes it abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a). However, intervenors urge that petitioners had an adequate remedy of appeal under the provisions of the Interlocutory Appeals Act, 28 U.S.C.A. § 1292(b).[4] But that very issue was

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[3] The Massachusetts Death Act provides in relevant part:

"A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *." Mass. Ann. Laws, C. 229, § 2. It has been held to be punitive in nature. *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128 (1956).

[4] "§ 1292. Interlocutory decisions

* * * * *

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of

squarely raised in *Swindell-Dressler* and was decided in the negative.[8] We, therefore, conclude that these petitions are properly before us.

On the merits, petitioners contend that because the personal representatives in the death actions have not obtained ancillary appointment in Massachusetts, they lack capacity to bring the actions in that state, and thus § 1404(a) does not authorize transfer to that district. Initially, reference is made to Rule 17(b) of the Federal Rules of Civil Procedure, which provides in revelant part: "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *."

Next, petitioners point out that under the law of Massachusetts a personal representative appointed in another state is not thereby qualified to maintain suit in Massachusetts, *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E. 2d 195 (1948), and that appointment as an ancillary or special administrator is in the discre-

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law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *." 28 U.S.C. § 1292(b) (1958 ed.).

[8] As we indicated in *Milbert* v. *Bison Laboratories, Inc.*, 260 F. 2d 431, 433 (C.A. 3, 1958), a portion of the legislative history of § 1292(b) would appear to support intervenors' contention. However, as we there pointed out, the district judge's written statement in the order, conforming to the language of the statute, is an essential condition precedent before we may even entertain an application for permission to appeal. Here, respondent, being fully aware of the provisions of § 1292(b), failed to include such a statement in his order. Moreover, as heretofore indicated, he has expressly dissociated himself from intervenors' argument as to the availability of § 1292(b) and the propriety of mandamus.

tion of the Massachusetts probate judge, Mass. Ann. Laws, C. 193, § 10. Finally, the Supreme Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), is cited as being dispositive of the issue before us.

In *Hoffman*, the district court in which suit had been properly brought transferred it to a district which did not have venue of the cause. The Supreme Court, affirming the judgment of the Seventh Circuit, held that this defect precluded transfer. The phrase "where it might have been brought" was construed as applying to the time when suit was originally instituted. With respect to the argument that the venue defect had been waived by the defendant's motion to transfer, the Court said, "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." 363 U.S. at pp. 343–344.

Respondent and intervenors would limit the holding in *Hoffman* v. *Blaski, supra*, to the requirement that the transferee forum have both venue and jurisdiction of the cause. They state that the existence of other potential defenses does not preclude removal, and cite several cases in which transfer has been effected although the suits would have been barred by the statute of limitations applicable in the transferee district.* Additionally, they argue that the

* *H. L. Green Co.* v. *McMahon*, — F. 2d — (C.A. 2, 1962); *Headrick* v. *Atchison, T. & S.F. Ry.*, 182 F. 2d 305 (C.A. 10, 1950); *Gomez* v. *S.S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico, 1959); *Crawford* v. *S.S. Shirley Lykes*, 148 F. Supp. 958 (S.D.N.Y. 1957); *Curry* v. *States Marine Corp.* v. *Delaware*, 118 F. Supp. 234 (S.D.N.Y. 1954); *Frechoux* v. *Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D.N.Y. 1953); *Greve* v. *Gibraltar Enterprises*, 85 F. Supp. 410 (D.N.M. 1949). Six of these

phrase "the action" does not include the parties to the action.

We think that the holding in *Hoffman* v. *Blaski, supra,* compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the tranferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from *Hoffman* v. *Blaski, supra.* Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman.* In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there.

A similar conclusion was reached in *Felchlin* v. *American Smelting and Refining Co.*, 136 F. Supp. 577 (S.D. Calif. 1955). There, suit was filed by California executors, and the defendant moved to dismiss or, in the alternative, to transfer the suit to the Western District of Texas. The court held that be-

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seven cases antedate *Hoffman* v. *Blaski, supra.* Moreover, the decisions in all seven were based upon the legal conclusion that the statute of limitations of the state of the transferor district would apply.

cause Texas forbids suits by foreign executors, the proposed transferee forum was not a district "where the action might have been brought." Accordingly, the motion was denied.

Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue.

The transfer sanctioned in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law.

The attempted differentiation between "the action" and the parties thereto is based on the language of Rules 13(h), 24, and 25 (b) and (c) of the Federal Rules of Civil Procedure. We think it without merit. These rules refer to the addition, intervention, or substitution of parties to a law suit which has already been instituted. Thus, they necessarily make separate reference to the action and the parties to the action. More important, to say that the action and the parties thereto are separate and distinct is to ignore reality, for the identity of the parties is determinative of such basic matters as jurisdiction and venue.

The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court.

Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of these petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in *Hoffman*, petitioners did not have an independent right to maintain suit in Massachusetts.

Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The short answer to this is that by the use of the phrase "where it might have been brought" Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17(b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in *Hoffman* v. *Blaski*, *supra*, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district.

Of course, our holding that the district court was without jurisdiction to transfer these suits relates only to the death actions. However, in light of this opinion the district court may wish to reconsider the transfer of the two personal injury suits, particularly as the death actions, which constitute the great majority of these suits, will now be tried in the Eastern District of Pennsylvania.

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside.

We assume that it will not be necessary to issue the writ unless a petition for certiorari is filed, and that the district court will vacate the order of transfer in accordance with this opinion.

United States Court of Appeals for the Third Circuit

No. 13,994

ROBERTA BARRACK, ADMX., ETC., ET AL.,
PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

SIDNEY W. POPKIN, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

HOWARD H. RAPP, ADMR., ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,011

LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,033

DORIS A. LAISTER, EXTRX., ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: STALEY and FORMAN, *Circuit Judges,* and LANE, *District Judge*

Upon consideration of the petitions for writs of mandamus or prohibition, of the answers by respondent and of the briefs, and after hearing:

It is ORDERED, ADJUDGED and DECREED by this Court that the prayers of the petitions be and the same hereby are granted and the Clerk of this Court is hereby directed to issue the writs of mandamus in accordance with the opinion of this Court.

By the Court.

STALEY, *Circuit Judge.*

Dated: December 7, 19—.

United States Court of Appeals for the Third Circuit

No. 13994

BARRACK, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13997

POPKIN, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14003

RAPP, ADMINISTRATOR, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, ET AL., EXECUTORS, ETC., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14033

LAISTER, EXECUTRIX, ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

Peremptory Writ of Mandamus

UNITED STATES OF AMERICA,
Third Judicial Circuit, ss:

To the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, greetings:

Whereas the Honorable Francis L. Van Dusen by order filed April 6, 1962 transferred to the United States District Court for the District of Massachusetts Civil Actions brought against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation and Civil Actions brought against the United States, a copy of which order is attached to this writ and marked Exhibit "A";[1] and

Whereas the plaintiffs in the actions ordered to be transferred have filed petitions for writs of mandamus and prohibition directing the respondent to vacate and set aside his order of transfer; and

Whereas the respondent has filed answers to the petitioners; and

Whereas the matter came on to be heard before this Court on the aforesaid petitions, answers and briefs; and

Whereas after due deliberation thereon this Court rendered its opinion November 19, 1962, that the Honorable Francis L. Van Dusen exceeded his authority when he entered the order of transfer on April 6, 1962, with respect to the civil actions in the death cases; and

Whereas on December 7, 1962, this Court caused to be entered herein its order, directing the Clerk of this Court to issue the writ of mandamus and prohibition

[1] This Exhibit is printed at pages 35a-36a in the petition for a writ of certiorari filed in No. 738, this Term.

in accordance with the opinion of the Court: Now, therefore,

The respondent, the Honorable Francis L. Van Dusen is hereby required and commanded, immediately after the receipt of this writ, and without delay to vacate and set aside the order of April 6, 1962, in the civil actions enumerated in Exhibit "B" [2] attached to this writ.

IDA O. CRESKOFF,
Clerk of the United States Court of Appeals for the Third Circuit.

Dated: December 14, 1962.

[2] This Exhibit is printed at pages 37a–45a in the petition for a writ of certiorari filed in No. 738, this Term.

United States Court of Appeals for the Third Circuit

No. 13,994

BARRACK, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

RAPP, ADMINISTRATOR, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*

Upon consideration of the petition for stay of the execution of the peremptory writ of mandamus in

these cases filed by Intervenors, Eastern Airlines, Inc., Lockheed Aircraft Corporation and General Motors Corporation,

It is ORDERED That,

1. The execution of the peremptory writ of mandamus shall be stayed for a period of thirty days from December 14, 1962;

2. If within the said period of 30 days, there shall be filed with the Clerk of this court a certificate from the Clerk of the Supreme Court in accordance with Rule 36(2) of this Court's Rules, the stay shall continue until final disposition of these cases by the Supreme Court; and

3. The Honorable Francis L. Van Dusen is directed to stay further proceedings in these cases until further order of this Court.

By the Court.

STALEY.

Dated: December 26, 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1963